No. 4082 at Law

In the United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA ex rel. THOMAS W. MILLER, Alien Property Custodian of the United States of America,

Plaintiff and Relator in Error,

—vs.—

C. L. BABCOCK, State Treasurer of the State of Washington,

Defendants and Respondent in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *Judge Presiding.*

BRIEF FOR PLAINTIFF AND RELATOR IN ERROR

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STATEMENT OF THE CASE.

In the year 1922 Thomas W. Miller, Alien Property Custodian of the United States of America, brought a certain action in the United States District Court for the Western District of Washington, Southern Division, against the officers of the De-

partment of Labor and Industries of the State of Washington for the purpose of gaining possession of certain warrants on the "Accident Fund" of the State of Washington which had been drawn in the name of certain alien enemies of the United States but which had never been delivered to the payees at the time when the United States entered the World War; that said warrants were drawn to the said payees and the claims had been duly and regularly allowed against the "Accident Fund" of the State of Washington also known as the "Workmen's Compensation Fund" in favor of the said alien enemies; these claims were all reported to the Alien Property Custodian either by the officers of the Department of Labor and Industries of the State of Washington or by their predecessors in office and demand made by the Custodian for the payment of all such claims soon after the declaration of war by the United States as will appear by the record in the above entitled case (see *Clifford vs. Miller*, 288 Federal Reporter, page 537); that said report and demand was long prior to the signing of the treaty of peace; that at the time said demand was made all the said warrants were outstanding obligations against the Accident Fund of the State of Washington and no period of limitations had expired

against any of them (Petition and Affidavit, Paragraph V).

That the defendant and respondent is the State Treasurer of the State of Washington and as such it is his duty to pay warrants drawn on the said "Accident Fund" by the State Auditor of the State of Washington on vouchers furnished by the officers of said department or their predecessors; that said action resulted in a judgment in favor of the Custodian which said judgment was appealed to this court and the judgment of the District Court was affirmed (see *Clifford vs. Miller*, Federal Reporter 288, page 537); that upon the filing of the remittitur and the entry thereof in the District Court the said warrants were delivered to the plaintiff and relator herein, the same having been in the custody of the Clerk of the United States District Court at Tacoma; that there has been at all times a sufficient reserve set apart in the said Accident Fund with the said State Treasurer by order of the director of the Department of Labor and Industries or the former Industrial Insurance Commission of the State of Washington and at all times maintained for the express purpose of paying each and all said claims for which warrants were issued (paragraph 8 of the Petition and Affidavit).

That upon securing the possession of the said warrants the plaintiff and relator presented them to the defendant and respondent for payment offering to endorse the same and surrender them to him; that the said defendant refused to pay the said warrants or any of them (paragraph 5 of Petition and Affidavit).

That upon such refusal the plaintiff and relator brought this action in the U. S. District Court for the purpose of securing a Writ of Mandamus requiring the said defendant to pay the said warrants; that an Order for an Alternative Writ and an Alternative Writ of Mandamus were issued which in due time were made returnable; that upon the return day thereof the defendant appeared in said action and demurred to the petition and affidavit of the plaintiff and relator upon the grounds that the court did not have jurisdiction of the person of the defendant or of the subject matter of the action and that the Complaint did not state facts sufficient to constitute a cause of action (see Demurrer).

Upon the argument of the demurrer, the U. S. District Court entered a Memorandum Decision sustaining the same solely upon the ground that the

court did not have jurisdiction to hear and determine the case (see Opinion of Court).

The plaintiff and relator thereupon refused to plead further and a judgment of the District Court was entered dismissing the petition and the action for want of jurisdiction to which ruling the plaintiff excepted and his exception was allowed (Judgment of Dismissal); that upon entry of judgment the plaintiff and relator sued out this Writ of Error alleging as grounds therefore those stated in his assignments of error (Assignments of Error).

That the plaintiff and relator desires the payment of said warrants that he may collect the funds and distribute them to those who by acts of Congress shall be designed to be entitled thereto and that he may perform his duties as an executive officer representing the President of the United States so that the President may carry out the treaty obligations of the government with the foreign nations whose subjects are interested in the said funds.

The sole question involved in this case is whether or not the action is against the State of Washington, and if so, can it be brought in the District Court or must the plaintiff and relator apply for his relief to the Supreme Court of the United States.

SPECIFICATIONS OF ERROR.

I.

The United States District Court erred in holding that it did not have jurisdiction of the Defendant and Respondent and of the subject matter of the action and in sustaining the demurrer of the Defendant and Respondent to the petition and affidavit of the Plaintiff and Relator.

II.

The Court erred in entering judgment in favor of the Defendant and Respondent and against the Plaintiff and Relator for lack of jurisdiction.

III.

The Court erred in not granting plaintiff and relator a peremptory Writ of Mandamus against the Defendant and Respondent upon the return made to the Alternative Writ issued in said action.

ARGUMENT.

I.

The Petition and Affidavit.

(a) The issuance of writs of mandamus follows the procedure prescribed for the State Courts by the State laws.

Rule 86, Page 72, Rules of Circuit Courts and District Courts.

(b) Issuance of the writ upon a sworn petition has been approved by the Supreme Court of Washington.

Smith v. Ormsby, 20 Wash. 396.
State ex rel. Cicoria v. Corgiat, 50 Wash. 95.
State ex rel. Adams v. Irwin, 74 Wash. 589.
State ex rel. Richardson v. Superior Court, 41 Wash. 439.

(c) That among the facts alleged in the affidavit and petition for the writ and admitted by the respondent's demurrer are:

1. That the relator is an executive officer acting under the President of the United States; that his position as Alien Property Custodian is by virtue of the "Trading with the Enemy Act," passed on the 6th day of October, 1917, and the acts of Congress amendatory and supplementary thereto, possessing all the powers granted by said acts and the executive orders in pursuant thereof. Paragraph I of Petition and Affidavit.

2. That the defendant and respondent is the State Treasurer of the State of Washington, and that it is a part of his duties to pay warrants which have been duly drawn by the Auditor of the State

of Washington upon the "Accident Fund" and issued to the holders thereof, upon vouchers presented to the Auditor by the officers of the Department of Labor and Industries or their predecessors in interest. Paragraph II of Petition and Affidavit.

3. That plaintiff and relator is the holder of certain warrants on the "Accident Fund" of the State of Washington possession of which was awarded him by a judgment entered by this Court in the case of *Clifford et al. v. Miller, Alien Property Custodian*, 288 Fed., page 537, as appears by Schedules A-B attached to petition. Paragraph IV of Petition.

4. That all of the claims represented by the warrants above referred to were demanded by relator of the Department of Labor and Industries in 1917 or 1918, but were unlawfully withheld from him until after the decision in the *Clifford* case; that relator did not receive the warrants till May 15, 1923; that all of said warrants were due former alien enemies or allies of alien enemies of the United States; *that relator is entitled to all of the said warrants and funds represented thereby under the Trading with the Enemy Act and was awarded them by the District Court and the Court of Appeals.* Paragraph V of Petition.

5. That the warrants were on the 26th day of May, 1923, duly presented by the relator to the respondent for payment and relator offered to surrender the same on payment of them; that respondent refused to pay the warrants or any of them. Paragraph V of Petition.

6. That the relator desires the payment of the warrants that he may carry out the acts of Congress and the treaty obligations of the government. Paragraph VII of Petition.

7. *That a sufficient reserve has been set apart in the accident fund with the respondent by order of the Director of Labor and Industries or the former Industrial Insurance Commissioners of the State of Washington and at all times maintained for the express purpose of paying each and all of the said claims for which said warrants were issued.* Paragraph VIII of Petition.

8. That the petition also contains the usual allegation that the respondent is an inhabitant of the judicial district in which the action is brought and that the relator has no plain, speedy, and adequate remedy in the ordinary course of law.

There could be no question about the sufficiency of this petition had it been filed in the Superior

Court of the State of Washington or the Supreme Court of the State of Washington. The question then arises can the action be maintained in the District Court of the United States.

II.

THE ACTION OF MANDAMUS IS RECOGNIZED BY BOTH STATE AND FEDERAL COURTS AS THE PROPER REMEDY TO COMPEL A MUNICIPAL OR STATE OFFICER TO PAY A WARRANT DULY ISSUED OR TO PERFORM ANY OTHER MINISTERIAL ACT.

Vol. 18, page 192, Par. 116, Ruling Case Law.

Vol. 18, page 225, Par. 149, Ruling Case Law.

J. A. Cloud v. The Town of Sumas, 9 Wash. 399.

The La France Fire Engine Co. v. E. D. Davis, Treasurer, 9 Wash. 600.

State ex rel. Dahlquist v. Van Wick, 20 Wash. 391.

State v .Akers, 92 Kan. 169, 140 Pac. 637; Am. Annotated Cases 1916-B, 543.

Eank of California v. Shaber, 35 Cal. 322.

State v. Gandy, 12 Neb. 232.

Busch v. Geisy, 16 Ore. 355.

Day v. Callow, 39 Cal. 393.

Jerome v. Rio Grande County Commissioners, 18 Fed. 873.

Robert v. U. S., 176 U. S. 221, 20 Supreme Court Reports 376; 44 Law Ed. 443.

Board of Liquidation et al. v. McComb, 92 U. S. 534, 541; 23 Law Ed. 623.

Virginia Coupon Cases, 114 U. S. 270, 293; 5 Sup. Ct. 903, 915; 29 Law Ed. 185.

Pennoyer v. McConnaughy, 140 U. S. 1, 10; 11 Sup. Ct. 699, 701; 35 Law Ed. 363.

Rolston v. Missouri Fund Com'rs., 120 U. S. 390, 411; 7 Sup. Ct. 599, 610; 30 Law Ed. 721.

III.

THE TRADING WITH THE ENEMY ACT PROVIDES THAT THE DISTRICT COURTS OF THE UNITED STATES SHALL HAVE JURISDICTION IN ALL ACTIONS ARISING UNDER IT.

Section 3115½ of this act reads as follows:

> "The district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice or otherwise, and all such orders and decrees and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the act of March third, nineteen hundred and eleven, entitled 'An Act to codify, revise and amend the laws relating to the Judiciary.' "

The questions then arise: what is the Trading with the Enemy Act? under what constitutional power, if any, was it passed? what is its purposes and object? was it intended that it should give to

the district courts of the United States original jurisdiction, or was its purpose to limit such jurisdiction to certain specific cases arising under it and leave other cases arising under it to other tribunals?

In order to understand the Trading with the Enemy Act let us then examine the Constitution of the United States and the Acts of Congress as they relate to the judiciary.

The Constitutional provision is as follows:

> "The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, under their authority; to all cases affecting ambassadors, other public ministers and consuls * * * to controversies to which the United States shall be a party. * * * In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as congress shall make." (Art. III, Sec. 2, Const. of United States.)

The Judicial Code of 1789 distributed the jurisdiction of the United States Courts as follows: The District Courts were given original jurisdiction:

First, of all suits of a civil nature at common law or in equity brought by the United States or any officer thereof. * * *

Second, or where the matter in controversy exceeds exclusive of interest and cost the sum of $3,000 and arises under the constitution or laws of the United States or treaties made or which shall be made under their authority * * *

Third, * * * of all seizures on land or water not within admiralty and maritime jurisdiction.

Fourth, of all suits against consuls and vice-consuls. (Hopkins' Judicial Code, Sec. 24, page 31.)

The Supreme Court of the United States was given exclusive jurisdiction of all controversies of a civil nature where a State is a party and in proceedings against ambassadors or public ministers and it was given original but not exclusive jurisdiction of all suits brought by ambassadors or other public ministers or in which a consul or a vice-consul is a party.

This action is brought by a United States officer and comes under Section I of the Judicial Code. It also arises under the constitution and laws of the United States and likewise comes under said section. It also has to do with seizures on land of

enemy property and comes under subdivision third of the Judicial Code.

All these sections give the District Courts jurisdiction of the present action. Congress also gave them jurisdiction under the provision of the Trading with the Enemy Act and for fear that someone might raise the question that the Trading with the Enemy Act did not include a State the act in Section II subdivision C defined the word person as follows:

> "The word person as herein used shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation, or *body politic.*"

The definition of a body politic is defined by the text writers as follows:

Anderson's Law Dictionary, page 127, "the governmental, sovereign, power of a city or a *state*" (the italic being ours).

Black's Law Dictionary says, "it is a name applied to the state."

The Supreme Courts of various states have defined it as "The state or nation as an organized political body of people collectively." *People v. Snyder*, 279 Ill. 435-440, 117 N. E. 119.

Chief Justice Gray, quoting Chief Justice Marshall, defined it in the case of *Von Brocklin v. Anderson*, 117 U. S. 119, 29 L. Ed. 846, Justice Gray says:

> "In the words of Chief Justice Marshall: 'The United States is a government, and consequently a body politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment. This great corporation was ordained and established by the American People, and endowed by them with great powers for important purposes. Its powers are unquestionably limited; but while within those limits, the faculties and properties belonging to a government with a perfect right to use them freely, in order to accomplish the object of its institution.' (*U. S. v. Maurice*, 2 Brock. 96, 109.)
>
> And Webster's New International Dictionary, 1921 Edition, defines body politic as "The state as a politically organized body of persons or as exercising political functions. "

The executive orders attached to the Trading with the Enemy Act also likewise uses the word "body politic" in defining to whom they shall apply. The Judicial Code of 1789 as amended also defined the appellate jurisdiction of the Supreme Court of the United States and provided in Section 238 that the Court should have appellate jurisdic-

tion in any case that involves the construction or application of the Constitution of the United States and in any case in which the constitutionality of any law of the United States is drawn in question.

The present action is ancillary to the former action of *Clifford v. Miller*, 288 Fed. 537. It is simply to make effective this decision that the present action is maintained. Ancillary cases may be brought in the District Courts in aid of a decree of the Federal Court, and are not forbidden by the eleventh amendment to the Constitution, even though they may be against State officers. *Gunter v. Atlantic Coast Line Ry. Co.*, 200 U. S. 273-4, 50 L. Ed. 478 *et seq.*

IV.

The Trading With the Enemy Act Is Complete in Itself; It Neither Expressly Amends nor Repeals Any Other Statute; It Was Passed to Meet the Emergencies of War.

Whether taken as originally enacted, October 6, 1917, Chap. 106, 40 Stat. at L. 411, Comp. Stat. Par. 3115½ A, Fed., Stat. Anno. Sup. 1918, p. 847, or as since amended March 28, 1918, Chap. 28, 40 Stat. at L. 459, 460; November 4, 1918, Chap. 201, 40 Stat. at L. 1020; July 11, 919, Chap. 6, 41, Stat. at L. 1020; July 17, 1920, Chap. 241, 41,

Stat. at L. 977, is strictly a war measure, and finds its sanction in the constitutional provision, Art. 18, cl. 111, "empowering Congress to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." *Brown v. United States*, 8 Cranch, 110, 126, 3 Law Ed., 504, 510; *Miller v. United States* (*Page v. United States*), 11 Wall. 268, 305, 30 L. Ed. 135, 144; *Stoehr v. Wallace* 255 U. S. 241, 65 Law Ed. 610. This last case says that an attempt of the Alien Property Custodian to recover property or funds comes under this section of the Constitution, and the passage of the Trading with the Enemy Act is simply making the necessary rules concerning captures on land. One of these rules is that the Alien Property Custodian must proceed in the District Court of the United States to enforce this law. Furthermore, the Judicial Code expressly gives the District Courts jurisdiction of all seizures on land and water not within admiralty and maritime jurisdiction. Judicial Code, Sec. 24, Par. third. The same Judicial Code that gives the District Court jurisdiction over seizures on land gives the Supreme Court jurisdiction in cases to which a State is a party. Judicial Code, Sec. 233.

It is clearly within the power of Congress to

thus distribute the jurisdiction, and it was clearly the intention of Congress not to give the Supreme Court original jurisdiction in that class of cases that involved seizures on land even though a State were a party.

Bearing upon this question, the Supreme Court of the United States, in the case of *Ames v. Kansas*, 111 U. S. 449, 28 L. Ed. 482, says: *"The judicial power of the United States exists under the Constitution, and Congress alone is authorized to distribute that power among the Courts."*

It is consequently fitting and proper that Congress should, as it has done, provide that the District Courts shall have jurisdiction of actions arising under the Trading with the Enemy Act. Furthermore, the present action arises under the Constitution of the United States and the Laws of Congress, and in this class of cases the Supreme Court of the United States has appellate and not original jurisdiction.

This matter was decided at an early date by the United States Supreme Court in the case of *Cohens v. Virginia*, 6 Wheat. 264 U. S., in a now historic opinion written by Chief Gray quoting Chief Justice Marshall, who showed where the line should be drawn, viz: if a State be a party, the

jurisdiction is original; if it arises under the Constitution of the United States or an Act of Congress, it is appellate even though a State be a party. *Cohens v. Virginia*, 6 Wheat. 264; 5 Law Ed. 257; *Ames v. Kansas*, 111 U. S. 47; 28 Law Ed. 491.

In the case of *Ames v. Kansas, supra*, the Court states:

> "Again, the grant of original jurisdiction to the Supreme Court is the same in the cases * * * in which a State shall be a party, as in the case of a consul."

In the year 1884, one Preston sued one Börs in the Circuit Court of the United States for the Southern District of New York. Börs was the consul at New York for the Kingdom of Norway and Sweden. The suit was at law for $7,313.10. The consul claimed his exemption and insisted that he must be sued in the U. S. Supreme Court, as the Constitution of the United States gave the Supreme Court jurisdiction in cases to which a State was a party, or in which a consul was a part. The Judiciary Act of 1789 had given the Circuit Court jurisdiction in this class of cases. The Supreme Court of the United States held that in this class of cases, the Circuit Court had original jurisdiction, and the Supreme Court appellate jurisdiction.

Börs v. Preston, 111 U. S. 256, 28 Law Ed. 420. This case was cited in the trial of the present action in the District Court, but for some reason the Court does not refer to this case in his opinion.

The fact that the Trading with the Enemy Act by the same section that gives the District Court jurisdiction, even though a body politic or State is involved, provides for appeals to the United States Circuit Court of Appeals and the United States Supreme Court, is proof positive that it was the intention of Congress to give the District Court original jurisdiction and the Supreme Court appellate jurisdiction in all cases arising under the Act.

The Supreme Court of the United States in the case of *United States v. Louisiana*, 123 U. S. 36, says that, "it is competent for Congress to authorize suits by a State to be brought in the inferior courts of the United States." Surely, if this be the case, it is likewise competent for Congress to provide, as it has in the Trading with the Enemy Act, that suits against a State may be brought in the inferior courts of the United States.

In an early Federal case, the right of Congress to confer jurisdiction on the inferior Federal Courts in those cases in which, by the Constitution, the

Supreme Court has been given original jurisdiction, was held to be unquestioned. The case is that of *State of Texas v. Lewis et al.*, 14 Fed. 65. In this opinion the Court says:

> "*Cases affecting consuls stand in the same precise category as cases in which a State shall be a party* (the italics are ours), and the opinion holds that the grant of original jurisdiction by Article 3, Sec. 2, of the Constitution, to the United States Supreme Court in all cases in which a State is a party, does not preclude Congress from conferring jurisdiction upon the Circuit Courts in cases brought by a State against an alien."

The right of the Legislature to distribute the original jurisdiction of the Supreme Court granted by the Constitution was early considered and decided by the Supreme Court of the State of Washington in conformity with the decisions of the United States Supreme Court in *Ames v. Kansas*, 111 U. S. 449; *Börs v. Preston*, 111 U. S. 252; *United States v. Louisiana*, 123 U. S. 32. In this action the present Senator from the State of Washington, Hon. W. L. Jones, was respondent, and the opinion was written by Justice Dunbar, father of the present Attorney General of Washington. *Jones v. Reed, Auditor of Washington, and Lindsley, Treasurer of Washington*, 3 W. 57.

But the contention of the respondent which was urged in the lower Court and which will probably be insisted on here, is that while Congress undoubtedly has the right to take the jurisdiction away from the Supreme Court and vest it in the District Court where a State is a party, by the passage of the Trading with the Enemy Act it has not done so. This leads us to a consideration of the Trading with the Enemy Act as interpreted by the decisions of the Federal Courts:

1st. It is a war measure enacted by virtue of Art. 1, Sec. 8, Cl. 11, of the Constitution, empowering Congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." *Central Union Trust Company v. Garvan*, 254 U. S. 533, 65 Law Ed. 403; *Stoehr v. Wallace*, 255 U. S. 241, 65 Law Ed. 610.

2nd. It is a summary measure and does not permit the merits or demerits of any seizure under it to be litigated in the Courts, but provides that, after the Custodian has made his demand, possession of the fund or property must be surrendered and a party claiming it must make good his claim against the Custodian by an action brought under Section 9, of the Act.

In the case of *Commercial Trust Company v. Thomas W. Miller* as Alien Property Custodian, decided April 23, 1923, reported in U. S. Supreme Court Advance Sheets of May 15, 1923, at page 542, it was held that "the Custodian succeeds to all the rights in the property to which the enemy is entitled as completely as if by conveyance, transfer or assignment;" that suits may be brought to gain possession of property or funds; that such suit is of as peremptory character as "seizure in pais, and is the dictate and provision for the emergency of war, not to be defeated or delayed by defenses, its only condition, therefore, being the determination by the Alien Property Custodian in that it was enemy property."

The decision further holds that the provisions of the Trading with the Enemy Act were passed by virtue of the legislative power of Congress; that the Act did not cease to be effective when the Treaty of Peace was signed, but is still in full force and effect. The Court in this connection says:

> "A Court cannot estimate the effects of a great war and pronounce their termination at a particular moment of time, and its consequences are so far swallowed up that legislation addressed to its emergency had ceased to have purpose or operation with the cessation

> of the conflicts in the field. Many problems would yet remain for consideration and solution, and such was the judgment of Congress, for it reserved from its legislation the Trading with the Enemy Act and amendments thereto, and provided that all property subject to that Act shall be retained by the United States until such time as the Imperial German Government * * * shall have * * * made suitable provisions for the satisfaction of all claims."

C. Trust Co. of New Jersey v. Miller, Custodian, supra; also *Kahn v. Anderson*, 255 U. S. 1, 65 Law Ed. 469; *Vincenti v. United States* (C. C. A.), 272 Fed. 114, and 256 U. S. 700, 65 Law Ed. 1178; *Ahrenfeldt v. Miller*, decided April 23, 1923, U. S. Supreme Court Advance Sheets, May 15, 1923, p. 546.

In a very recent decision in re. *Miller*, 281 Fed. 773, the Federal Court, referring to the duties of the District Courts to enforce the Act, says:

> "It certainly needs no argument to show that if the Custodian was entitled to make the demand for the delivery of the property, he was equally entitled to resort to the District Court after his demand was not complied with, *for the Act, itself, expressly makes it the duty of the Court to enforce the provisions of the statute.* It certainly is true that Section 17 was not intended to be a *shield* to be used by the persons who are resisting compliance with the

> Custodian's demand, but rather as a *sword* against those who ignore the peremptory character of the action. The Custodian is in Court now not asking a new seizure of property in his behalf, but to aid him in a seizure already made. Every feature of the Act has been considered and construed and upheld by the Supreme Court and the Federal Court, citing several recent cases."

The present case is not a new demand, but simply the enforcement and carrying out of the original demand made for this fund; it is simply to make effective the judgment in the *Clifford* case.

The Supreme Court of the United States has frequently held that ancillary cases may be brought in the District Court in aid of a decree of the Federal Court, and are not forbidden by the eleventh amendment, or the Constiution itself, even though they may be against State officers. *Gunter v. Atlantic Coast Line R. R. Co.*, 200 U. S. 273-4, 50 Law Ed. 478 *et seq.*

The proceeds of these warrants do not belong to the State of Washington, but title to the same became vested, for the purpose of distribution under Acts of Congress, in the Custodian early in 1918, when he made his demand therefor. *Kohn v. Kohn*, 264 Fed. 253; *Miller v. Camp*, 280 Fed.

525; *In re Miller*, 281 Fed. 764; *Garvan v. $20,000 Bonds*, 265 Fed. 477.

The Act in question is a complete statute passed in the emergency of war to regulate dealings with the enemy. It is our contention that the war power of Congress is Supreme; that every other constitutional provision must give way to it; that the Trading with the Enemy Act gives the District Courts sole authority to make all orders, rules and regulations to make it effective. Had Congress so desired, it could have given this power to the military Courts, or provided a special tribunal, even though such action were against the State. When it designated the District Courts as the tribunal to enforce this law, and made it apply to persons, corporations, associations, individuals and body politics, it took in everything, and intentionally so, that all enemy-owned property, regardless in whose custody it might be, should be seized, held and collected to meet the expenses attending the war. It was peremptory and it was never the intention to require the Custodian to go to the United States Spureme Court in order to sustain a demand against a State. The Supreme Court of the United States is not primarily a Court of original jurisdiction. It has neither the time nor the facilities

for taking of evidence and examination of witnesses. It is inconceivable that it was the intention of Congress to compel the Custodian to proceed in the United States Supreme Court in an action where a State officer withheld from him property or money to which he was entitled. The Trading with the Enemy Act shows that it was the intention of Congress that all actions, those against State officers as well as others, should be brought in the District Courts. Otherwise, it would not have used a term like "body politic," which is confined almost solely to the State.

So paramount is the War Power of Congress that the United States Supreme Court has held that it can displace the police power of a State.

It was held in *Masses Publishing Company v. Patten*, 246 Fed. 24, Annotated Cases 1918-B, 1009, that this power is the legislative power which Congress possesses as an incident to the expressly granted power to declare war; "The Constitution vests in Congress plenary war power; Congress can begin, carry on and terminate wars without any express limit as to time, means or manner." *Tod v. Fairfield Co. Ct.*, 15 Ohio St. Rep. 389.

It is said in *U. S. v. Casey*, 247 Fed. 362: "The war power resides in the Nation's right of self-pre-

servation—the preservation not only of itself, but of all of its citizens;" and in *Story v. Perkins*, 243 Fed. 997, it was said, after the enumeration of the powers of Congress, among them, as we have seen, "the power to raise and support armies, in Clause 18 of Articles 1 to 8, it provides the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all powers vested by this Constitution in the Government of the United States or in any department or officer thereof. Here is the great reservoir of power to save the National existence. The President of the United States is the Commander in Chief of the Armies and Navies, and when Congress declares war, by that declaration it puts in force the laws of war, and the war powers of the Government which are not to be exercised under the Constitution in times of peace, come into full force by virtue of the Constitution and are to be executed by the President and Congress." *McCormick v. Humphrey*, 27 Ind. 144. In the same case, quoting from Chief Justice Marshall, the opinion says: "Congress must possess the choice of means and must be empowered to use any means which are, in fact, conducive to the exercise of a power granted by the Constitution."

How absurd it is, in the light of these decisions by our highest Courts, to say that Congress has not the power in a comprehensive war measure like the Act in question, to give the District Courts jurisdiction over this war measure, unless it expressly repeals by direct enactment that part of the Judicial Code which gives the Supreme Court exclusive jurisdiction in cases to which a State is a party.

It was said in *Merchants, etc., Bank v. Union Bank*, 25 La. 387: "In the exercise of war powers, the United States is not restrained by the limitations which the Constitution imposes on it as a sovereign."

It is said in *U. S. v. Casey*, 247 Fed. 362, that this Congressional power extends to the most minute regulation of conduct, and Tarbel's Case, 13 Wall. 397, 20 U. S. Law Ed. 597, holds that this war power is not subject to the police power of a State, and is not subject to interference by a State government.

The Trading with the Enemy Act was passed to enable the Government to peremptorily seize and sequester and manage and control all enemy-owned property during the period of the war and reconstruction, and does not, by its terms, repeal or amend any other act of Congress.

It deals with subjects which, but for the Constitutional right of Congress to wage war, would be unconstitutional and void.

It forbids trading with the enemy, which in time of peace, under existing peace laws, would be unconstitutional.

It provides for sequestration of all enemy properties for search and seizure and many other things which would not be considered except for the war emergency. It provides for many things upon which were statutes already existing, and yet it does not repeal or amend any of them. It provides what Courts shall have jurisdiction of cases arising under the Act.

It was undoubtedly the purpose of Congress to give the President absolute and plenary control of all enemy property that the war might be fought to a successful termination, and settlements made without interference with persons, associations, partnerships, corporations or body politics. In order to do this, it was necessary to provide some tribunal which had the necessary machinery at hand, and who might aid the President of the United States to enforce his demands in the event that they were not complied with.

It not only did provide such a tribunal in the District Court of the United States, but it also placed upon these Courts the burden of making all necessary orders, rules and regulations to carry into effect the Act.

It is no more a repeal of existing statutes to provide that a District Court shall have jurisdiction in cases where a body politic is involved, although prior to that time such jurisdiction might have been vested in the United States Supreme Court, than it is a repeal of the provisions of the statutes of the United States, which in time of peace secures everybody against search and seizure, and against the taking of his property without due process of law. The Act in question gives the President the right to summarily seize all alien property.

The war power of Congress is so paramount that every other Constitutional power must give way to it. *U. S. v. Tarble*, 80 U. S. 397-413; *Miller, Executor, v. United States*, 78 U. S. 268-331.

The Espionage Act in time of peace would have been held unconstitutional but as a war measure it was sustained. *Jefferson Publishing Co. v. West*, 245 Fed. 585; *U. S. v. Pierce*, 245 Fed. 878.

The Federal Courts have held that this war power has no limitations, and so held in sustaining the

selective draft law. *U. S. v. Sugar*, 243 Fed. 423.

The respondent's claim made in the lower Court that he should not pay these warrants because more than five years had elapsed since they were drawn, is not tenable and *cannot be sustained.* The opinion of the District Court does not discuss this, basing his decision entirely on the lack of jurisdiction because the action was brought in the District Court of the United States, instead of the Supreme Court of the United States; but, inasmuch as this matter was considered in the lower Court, we will refer to it here. The section of the Washington statute pertaining to this question is 11008 of Rem. Com. Stat. of Washington, 1922, reading as follows:

> "All warrants drawn on the State Treasurer shall be presented for payment within the period of five years after the date of the issuance thereof, and should the payee of the warrant or warrants neglect to present the same for payment within the time specified, it shall be the duty of the State Auditor to enter the same as canceled on the books of his office, and to notify the State Treasurer of such cancellation."

The section further provides that the Auditor may, under certain circumstances, issue duplicates. Were there anything in this contention, it would not be available to the respondent, because the statute of limitation, in order to be effective, must

be pleaded. If raised by demurrer, it must be by a special demurrer, and not by a general demurrer that the petition does not state facts sufficient to constitute a cause of action. Encyclopedia of Pleading and Practice, Vol. 13, page 200, Par. 4, and Vol. 13, Par. 4, Sec. 7. *National Bank v. Carpenter*, 196 U. S. 167. As a matter of fact, however, both State and Federal authorities hold that in the circumstances alleged in the petition in this case, the warrants in question were never issued. It has been repeatedly held that a warrant is not issued until it has been drawn and placed in the custody of some person who was authorized to collect it. The Supreme Court of Washington early decided this in the case of the *American Bridge Company v. Wheeler*, 35 Wash. 40, where the Auditor drew a warrant but did not deliver it to anyone authorized to receive it. The situation is the same here. The warrants were drawn and placed with the Department of Labor and Industries. They were demanded in 1918 by the Alien Property Custodian long before the five-year period elapsed as to any of them. They were not received by anyone authorized to collect them until May 15, 1923, when the relator received them as a result of the judgment in the case of *Clifford v. Miller*, 288 Fed. 537. To the same effect

is *Brownell v. The Town of Greenwich*, 22 N. E. 24-27; 114 New York 518; 4 L. R. A. 685; *State v. Pierce*, 52 Kas. 521. The same has been the uniform holding of the District Courts and Circuit Courts of the United States—the leading case being that of *Corning v. Meade County Commissioners*, 102 Fed. 57.

Furthermore, it is a well known principle of law that all Statutes of Limitations are suspended by war, and the *Treaty of Peace* was not signed until November 15, 1922. In the circumstances, the period of limitations would not begin to run against the warrants until May 15, 1923, when they were delivered to the relator representing the claims.

It is the duty of the Department of Labor and Industries to ascertain and establish the amounts to be put into and taken out of the Accident Fund. Sections 77 to 103 of Rem. Com. Stat. of Washington, Sec. 2.

It is the duty of the Treasurer to pay every warrant out of the fund upon which it is drawn, and disbursements can only be made upon warrants drawn by the State Auditor upon vouchers transmitted to him by the Department and audited by him. The warrants in question were all legally drawn upon proper vouchers upon claims duly al-

lowed, *and there is money in the Treasury set apart expressly for the payment of these warrants, as stated in the petition and admitted by the demurrer.*

V.

The Eleventh Amendment to the Constitution of the United States Has No Application to the Present Case.

This amendment is as follows: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State." It requires no argument to show that a suit brought by the President of the United States to enforce an act of Congress is not covered by it. That the case is one brought by the United States cannot be questioned, even though it be brought by an executive officer. In other words, the eleventh amendment does not cover cases brought by the sovereign powers. *State of Louisina* v. *James Rudolph Garfield*, 211 U. S. 70, 53 Law Ed. 92; *Oregon* v. *Hitchcock*, 202 U. S. 60, 50 Law Ed. 935; *Naganab* v. *Hitchcock*, 202 U. S. 473, 50 Law Ed. 1113; *Minnesota* v. *Hitchcock*, 185 U. S. 373.

VI.

The Authorities Cited by the Respondent in the Lower Court and Referred to in the Opinion of the District Court.

The principal case mentioned is *Lankford* v. *Platte Iron Works*, 235 U. S. 461, 59 Law Ed. 316, 35 Supreme Court Report 373. This was an action brought against State officials to secure certain funds held in the Treasury of Oklahoma under the Oklahoma Bank Guaranty Act. It was decided in a five-to-four opinion, the majority holding that this was an action against the State, although prosecuted against State officers.

This case might have some application were it not for the Trading with the Enemy Act.

The case did not involve the Constitution of the United States, nor an Act of Congress.

It did not involve a statute passed by Congress in furtherance of the war power granted the President and Congress by the Constitution of the United States.

It had nothing whatsoever to do with the Trading with the Enemy Act, but construed a statute of the State of Oklahoma. The Supreme Court of the United States has not seen fit to follow, to any

great extent, this decision, even in the cases where the Trading with the Enemy Act was not involved. The case is distinguished in *Johnson* v. *Lankford*, 245 U. S. 544, 62 Law Ed. 460.

The acts of the State officers of the State of Washington, in withholding possession of this fund from the Custodian is a violation of the criminal section of the Trading with the Enemy Act. Sec. 16 of the Trading with the Enemy Act provides that any person who shall wilfully violate, neglect or refuse to comply with any order of the President issued in compliance with the provisions of the act, shall be fined not more than Ten Thousand Dollars, or, if a natural person, shall be imprisoned.

The Supreme Court has drawn a distinction between acts of officers erroneously performed and those arising in tort. In a case much later than the Oklahoma case, *Truax* v. *Raich*, 239 U. S. 35, 60 Law Ed. 131, Justice Hughes, writing an opinion, states that such an action was not against a State, citing ex parte Young, 209 U. S. 123, 155, 161, 52 Law Ed. 714, 727, 729, and numerous other authorities.

Much was made in the lower court of a statement of Justice Rudkin, of this court, in the case of *Clifford* v. *Miller*, 288 Fed. 537, in which the

case of *Lankford* v. *Platte Iron Works* was referred to, it being assumed by the attorneys for the respondent that this remark indicated that the Circuit Court of Appeals would not sustain the right of the Custodian to mandamus the State Treasurer for the payment of the warrants, possession of which had been ordered delivered to him by the above decision. This statement was not necessary for a decision of the case, hence was dictum, and it is not our belief that this Court intended that such a construction should be placed upon it. The Court very well said, in the same opinion, that the Alien Property Custodian has succeeded to the rights and remedies of the alien enemies. It seems to us absurd to say that an alien enemy would not have a right to collect these warrants which had unlawfully been withheld from him by the Department, although his title to the warrants was unquestioned.

VII.

CONCLUSION.

The attitude of the State of Washington in this matter is incomprehensible. In the case of *Clifford* v. *Miller*, 288 Fed. 537, the plaintiff was awarded certain property, including the wararnts in question.

It has never been contended by the respondent

or anyone connected with the State government of Washington, but that the Alien Property Custodian was entitled to the warrants and the funds represented thereby, and such contention could not be made in the line of all of the decisions of the United States Supreme Court. The officers of the State of Washington, instead of complying with the request of the Custodian and aiding him in securing the funds in question and in carrying out the treaty obligations of the Government and the difficult problems of reconstruction with which the President of the United States is burdened, have placed every obstacle in the way of the President of the United States.

In the Clausen case, that is set for hearing today, officers of the Department of Labor and Industries said that in the issuance of the vouchers to the Custodian they were *doing so involuntarily*, and were compelled to do so by this Court. What a position to take by State officers of the State of Washington! They say, "Yes, you are entitled to the funds, but you have not proceeded before the proper tribunal." They say that it is not within the power of Congress to delegate to District Courts the right of the President of the United States to proceed in cases in which a State officer is involved.

The State officers appeared in the Clifford case, and by their demurrer admitted that the Treasurer of the State of Washington stood ready and willing to pay the warrants in question. They appear in this action by the same Attorney General, and now claim that the Treasurer is unwilling to pay these warrants. The State officers in their attitude assume that the State is greater than the Nation, and the right of the officials is paramount to that of the President of the United States in a matter in which Congress, under its war power, has given the President extraordinary and plenary power.

We submit that the demurrer should be overruled; that the case should be reversed; that the respondent, having made no return except by filing a demurrer to the petition, should be required, by a peremptory writ, to pay to the Custodian the warrants in question.

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